APPENDIX A

A. C. PARK,
Petitioner-Appellant.

versus

H. T. (Tommy) HUFF,
Respondent-Appellee.

No. 73-1897.

United States Court of Appeals.
Fifth Circuit.

Jan. 20, 1975.

Appeal from the United States District Court for the Northern District of Georgia.

Before BROWN, Chief Judge, and WISDOM, GEWIN, BELL, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, SIMPSON, MORGAN, CLARK, RONEY and GEE, Circuit Judges.

COLEMAN, Circuit Judge.

Floyd Hoard was the Solicitor General (District Attorney) of the Piedmont Judicial Circuit of the State of Georgia. On the morning of August 7, 1967, by means of a dynamite bomb attached the previous night to the ignition system of his automobile, the Solicitor General was precipitately dispatched from this world.

Among those soon indicted for murder in connection with this heinous occurrence was A. C. Park, the present habeas corpus appellant.

A jury in Jackson County convicted Park, with no recommendation for mercy. He was sentenced to death by electrocution. On appeal to the Supreme Court of Georgia, the conviction was reversed for the failure to have accorded Park the right to both open and close the jury arguments in compliance with certain provisions of a Georgia statute which had been in effect since 1852. Park v. State, 224 Ga. 467, 162 S.E.2d 359, 368 (1968).

At the second trial, Park was again convicted and the conviction was affirmed. Park v. State, 225 Ga. 618, 170 S.E.2d 687 (1969).

On petition for certiorari, the United States Supreme Court, without reaching the merits, vacated the death penalty and remanded the case to the Supreme Court of Georgia for further proceedings. Park v. Georgia, 408 U.S. 935, 92 S.Ct. 2845, 33 L.Ed.2d 749 (1972). This resulted in a life sentence, Park v. State of Georgia, 229 Ga. 731, 194 S.E.2d 410 (1972).

This did not end matters. Park next instituted habeas corpus proceedings, attacking the constitutional validity of his conviction. In an extensive written opinion (which does not appear to have been reported in Federal Supplement), the District Court for the Northern District of Georgia denied relief, (1973).

On appeal to this Court, that judgment was reversed, one Judge dissenting, Park v. Huff, 493 F.2d 923 (1974).

The case was subsequently ordered reheard en banc, with oral argument, 493 F.2d 935 (1974).

Upon such rehearing, we are convinced that Park's conviction involved no collision with the Confrontation Clause of the Sixth Amendment. We affirm the judgment of the District Court.

Four men were indicted along with Park.

J. H. Blackwell had connected the bomb to the automobile ignition. With full knowledge of the scheme, Lloyd G. Seay and George Ira Worley had assisted in obtaining the dynamite at a store in Anderson, South Carolina. They were lurking near the Hoard residence on the Sunday night when the deadly deed was done, having gone there in the same automobile with Blackwell.

Douglas Pinion initiated the $5,500 contract for the killing and later paid the fee to Seay, but he did not go to the murder scene.

At the time of Park's second conviction, Pinion, Blackwell, Seay, and Worley were all serving life sentences for the murder. Seay and Blackwell pleaded guilty upon a recommendation for life sentences. Juries convicted Pinion and Worley, see Pinion v. State, 225 Ga. 36, 165 S.E.2d 708; also unreported opinion of District Judge Sidney O. Smith, Jr. (App. 395).

The extensive trial and appellate records compiled prior to the filing of the petition for habeas corpus raise no substantial dispute as to the roles respectively played by Blackwell, Seay, Worley, and Pinion in the paid assassination.

The legal battle, the one we are concerned with here, has been, and is, over the conspiratorial part allegedly played by Park, of which he stands convicted and from which he seeks escape by the federal habeas corpus door.

On Park's second appeal, the Supreme Court of Georgia held that the evidence at the second trial "was at least as strong as on the first trial and amply authorized the verdict", 170 S.E.2d at 691.

FACTS RECITED BY THE GEORGIA SUPREME COURT

Our reading of the record prompts us to adopt, as amply supported by the record, the recitation of the evidence recited by the Georgia Supreme Court in its opinion disposing of the first appeal, 162 S.E.2d 361-363:

> "About the latter part of March 1967, Solicitor General Hoard was concerned about the illegal sale of alcoholic beverages being made from a garage at the residence of the defendant Park and also from a building owned by him and known as 'the yellow house,' both located in Jackson County, where the sale

> of alcoholic beverages was not legal. There was evidence that since 1965 Park and the co-indictee Pinion had worked together in such sales. In late March Hoard began an investigation of these sales. This investigation was begun without telling local sheriff Perry, but later Hoard apparently informed him.
>
> "Hoard obtained the assistance of an agent of the Georgia Bureau of Investigation, and in turn other law enforcement personnel were brought in. Several of these men made purchases at the above named places in order to obtain evidence for a contemplated padlock proceeding. One testified that 'this was an open operation and there — nothing hidden about the thing. You just walked in there and asked him for some liquor and he sold it to you and it was more or less generally known it was carried on that way.'
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> "A raid was scheduled for Saturday afternoon, May 6, 1967. However, on Friday evening it was discovered that Park was attempting to move large quantities of alcohol from these two places. Thereupon, the scheduled raid was immediately made and $21,700 of contraband, consisting of 31 cases of whiskey and 2,254 cases of beer, was taken. Park and Albert Funderburk, who had been employed at 'the yellow house' by Park for almost two years, were arrested. Criminal cases were made against the two men by Hoard.

"On May 23, 1967, upon Hoard's petition, an order was issued directing that the two places be padlocked.

"On July 11, 1967, Park, Funderburk and another employee of Park entered pleas of guilty for such illegal alcohol operations, and their fines, totaling $6,300, were paid by Park. Also, on this date, an appeal from the padlock order was dismissed. About this time Funderburk made plans to move back into the yellow house in August.

"Neither this padlock order nor the confiscation order on the alcohol seized was carried out until after the death of Hoard. There is no evidence as to why these orders were not executed.

. . . . .

"Next, we recite the salient testimony of events immediately surrounding the murder.

"This testimony was given by the co-indictee Blackwell, to whom the State had offered to recommend a life sentence provided he would testify fully, fairly and completely, and also by the co-indictee Seay. No mention of any such offer to Seay appears.

[BLACKWELL'S TESTIMONY]

"Blackwell's testimony, insofar as material on these issues, was that which follows.

"Prior to Solicitor General Hoard's death Seay asked Blackwell if he had the nerve to kill anybody and two weeks later inquired of him if he would 'blow that man up,' without identifying anyone. No affirmative answer appears to have been given.

"On Thursday before Hoard's death on Monday, August 7, 1967, Seay, Blackwell, and another co-indictee, Worley, met by prearrangement at a named highway restaurant in another county and drove to Anderson, South Carolina, where Blackwell, with money provided by the others of that group, purchased sticks of dynamite and caps. On Saturday Seay showed Blackwell how to connect these to the coil of an automobile.

"On Sunday evening Blackwell, Seay and Worley met. Seay offered Blackwell $1,500 if he would go with them and watch while Seay or Worley put the dynamite on the car. One of them, Seay he thought, told Blackwell 'the man wanted it done that night before he went to court on Monday.' Worley pointed out Hoard's house, and Seay made a short trip to verify it and the car parked there as Hoard's. During this time Blackwell and Worley went

to a nearby place, wired several sticks of dynamite together, and returned to a point near Hoard's residence.

"Then Blackwell went to Hoard's yard where his car was parked, placed the dynamite and one cap to the coil of the car, and rejoined Seay and Worley. The three drove away, and at a bridge the shoes and gloves Blackwell had worn were thrown out.

"Later on the same night Blackwell went to Wrightsville, Georgia, and during the morning heard of Hoard's death over the radio.

"On the following Wednesday, Seay gave Blackwell $700 in cash and an automobile valued at $800.

"Blackwell identified certain photographs, including places and objects associated with the murder.

[SEAY'S TESTIMONY]

"The testimony of the co-indictee Seay, insofar as material here, was that which follows.

"He had known Blackwell about eight months, Worley four or five years, and Pinion some six to eight years. He was 23 years of age and had known Park since childhood.

"He had not had any direct dealings with Park.

"In June, about two months before Hoard's death, Pinion asked Seay if he wanted to make some 'easy money,' and later told him that 'he wanted a man done away with,' saying it was Hoard. He did not say who wanted it done, but mentioned to him 'the old man' several times.

"Pinion had told Seay on a number of occasions that he was working with Park, and Seay once talked with both of them about their buying liquor from him. They talked about payment and arrangements in connection with this, and one of them told him that whenever he needed money he could come to Park's place and pick it up, but Seay did not recall ever doing so.

"This dealing with Park and Pinion began three or four years previously and continued until Hoard was killed. Pinion was the only person he dealt with on behalf of Park. When he had the conversation with Pinion about doing away with Hoard, he knew that Pinion was acting on behalf of Park, and in their conversations Pinion and he always referred to Park as 'the old man.'

"Pinion did not tell Seay that 'the old man' wanted Hoard done away with, but that 'a man wanted somebody done away with.' Also, he

did not say why he wanted Hoard killed. He mentioned to Seay the liquor raid made by Hoard, but Seay did not recall whether this was at the same time he discussed killing Hoard.

"Pinion first offered Seay $5,000, and said it would be best to kill Hoard on the road with a shotgun as he was returning home.

"Seay told Pinion that he was not interested but would try to find someone. Seay mentioned it to Worley, who wanted $7,500. Worley did not know whom Seay had in mind to be killed. Pinion said that Hoard had to be killed before he went to court that Monday morning, and Seay so told Worley. Seay then reported to Pinion that he had someone to do it if he would pay more money. Pinion replied 'Well, that is all the man will pay,' and 'I don't think the man will pay any more. I will go see. I will check.' Pinion left and in about 45 minutes he returned and told Seay, 'the old man won't go up any more. I will put $500 on it. Make it $5,500.' Worley did not wish to do it but decided to go ahead.

"On either Thursday or Friday, Seay, Blackwell, and Worley arranged their meeting at a highway restaurant, made the trip to South Carolina, purchased the explosives, returned to Jackson County, and Blackwell experimented with wiring the caps to a 1964 Ford automobile.

"Seay told Worley that he did not want to be involved, but Worley replied that if he didn't, 'the old man' would get someone else and intimated that 'the old man' would harm him or his family. Seay knew whom Worley was referring to, and stated that 'we always referred to "the old man" as Mr. Park.'

"Seay then testified essentially the same as Blackwell with reference to what transpired later, including the meeting on Sunday night of him, Blackwell and Worley, their proceeding to and locating Hoard's residence and car, tying the explosives, Blackwell's rigging them to the automobile, disposing of the shoes and gloves, going to Wrightsville, learning of Hoard's death, and returning to Pickens County. Seay also identified the same photographs that Blackwell had verified.

"Five or six days after Hoard's death Pinion brought $5,500 in cash to Seay, and Seay gave the money to Worley who divided it $2,000 to Seay, $2,000 to Worley and $1,500 to Blackwell. Pinion told Seay that 'the old man' was worried and had asked who did it, and that he had told him others did it.

"There was testimony by other witnesses for the State, which verified some of the foregoing, particularly the physical facts, but it is not necessary to recite it here.

"In his unsworn statement Park disavowed any participation whatever in the murder of Hoard."

Our panel opinion in this case stated, "The out-of-court statements of Pinion and Worley, however, clearly implied that Park was involved in the conspiracy to murder Solicitor General Hoard", 493 F.2d at 927. The panel opinion also noted the existence of "testimony that Pinion acted as Park's 'enforcer' and that he used guns and administered beatings in the prosecution of their illicit business". In other words, when Pinion went to see "the old man" about raising the fee for the assassination, the deduction that Pinion was acting for and on behalf of Park rested on far more than fanciful grounds.

After its recitation of the facts in evidence, the Supreme Court of Georgia applied the law as follows, 162 S.E.2d 364, 365:

"Since this defendant did not commit the act itself and was not actually present at the scene when others committed it, in order for him to be convicted the evidence must connect him with the crime upon the theory of conspiracy, which is 'a corrupt agreement between two or more persons to do an unlawful act.' Fincher v. State, 211 Ga. 89(4), 84 S.E.2d 76.

"Proof of conspiracy is required for the admission of the testimony of Seay as to declarations allegedly made to him by Pinion

and as to statements allegedly made to him by Worley.

"Our Code, § 38-306, provides that 'After the fact of conspiracy shall be proved, the declarations by any one of the conspirators during the pendency of the criminal project shall be admissible against all.' This court, in applying this section, has held that the conspiracy itself must be proved by evidence aliunde such declarations, and that the declarations are not admissible unless the conspiracy is prima facie shown by such aliunde evidence. Lanier v. State, 187 Ga. 534(4), 542-543, 1 S.E.2d 405, and citations.

"The existence of a conspiracy 'may be established by direct proof, or by inference, as a deduction from acts and conduct, which discloses a common design on their part to act together for the accomplishment of the unlawful purpose. In other words, the existence of the common design or purpose between two or more persons to commit an unlawful act may be shown by either direct or circumstantial evidence.' Chappell v. State, 209 Ga. 701, 702, 75 S.E.2d 417, 418.

"Under the evidence here there was admittedly and unquestionably a conspiracy among several persons to violate the laws of this State with reference to the sale of alcoholic beverages. It is equally certain that the defendants Park and Pinion were mem-

bers of that conspiracy, and it is probable that others, including Seay, belonged to it.

"The State contends that Hoard's death was pursuant to or in furtherance of that conspiracy. It relies upon the rule that 'It is not necessary that the crime of murder should be a part of the original design; but it is enough if it be one of the incidental probable consequences of the execution of their design * * *' (Gore v. State, 162 Ga. 267(1)(a), 134 S.E. 36, 38), or if it is 'naturally or necessarily done pursuant to, or in furtherance of the conspiracy.' Handley v. State, 115 Ga. 584, 41 S.E. 992 (one Justice absent).

"The State urges that the evidence as a whole, and with all inferences and deductions therefrom, leads to the conclusion that the death of Hoard was deemed necessary to protect Park's illegal liquor operations and was in furtherance of the conspiracy to violate the liquor laws. It argues that Hoard's death was considered necessary because he planned to present to the grand jury on the day of his death facts as to Park's activities.

"For support of this contention the State relies upon much of the foregoing evidence, including the following: that Hoard had instituted the padlock proceedings against Park; that he had caused the confiscation of Park's contraband alcohol; that he had filed criminal accusations against Park and others;

that they had plead guilty and their fines totaling $6,300 had been paid by Park; that Park's liquor locations had not been in fact padlocked; that the contraband had not been destroyed; and that Funderburk intended to move back in 'the yellow house' in August.

"As we view the record, a conspiracy involving the defendant in the murder of Hoard was prima facie shown by such aliunde evidence, and the inferences and deductions therefrom.

"In view of such evidence as to conspiracy it follows that it was not error to permit Seay to testify as to the declarations made to him by Pinion that 'the old man won't go up any more' and that 'the old man was worried'; or as to Worley's statement to him that 'the old man' would harm him or his family if he did not participate.

"Accordingly, it was not error for Seay to testify that Pinion told him that he was working with Park in the liquor business. Nor was it error for him to testify that he knew when he was dealing with Pinion in June that he was dealing with him as agent of Park, since the basis for that statement was that Pinion had told him about Park's involvement in the conspiracy to kill Hoard."

The evidence at the second trial, which resulted in the affirmed conviction, followed that of the first trial

except the State ran into several obstacles in its effort to develop the proof. For example Blackwell, the man who had placed the deadly bomb, who had testified at the first trial, and who had already received a life sentence on a plea of guilty recommended in return for his willingness to testify, invoked his Fifth Amendment privilege against self incrimination and refused to testify at the second trial. Since he had been thoroughly cross-examined at the prior trial (by the same counsel who was participating in the second trial) Blackwell's recorded testimony was read to the jury.

Seay had been sentenced as had Blackwell. When called to the stand he likewise invoked the Fifth Amendment. Later on, he abandoned this position, did testify, and was most thoroughly cross-examined. Under cross-examination by defense counsel, he explained his original unwillingness to take the witness stand a second time by swearing that while in prison he had been offered $10,000 to repudiate his former testimony and that the safety of his wife and small children had been explicitly threatened. While being pressed by Park's counsel, Seay said that he had been offered $10,000 to repudiate his prior statement by one Nixdorf. He was asked if he would perjure himself to save his wife's life, to which he responded, "I'd do anything to save her life."

At another point, on cross-examination, he was asked, "Are you saying that Mr. Park over here threatened your wife?"

Answer. "Well, I'm saying that he sent Mr. Nixdorf down to see me, offer me money not to get back where I was, hire me any lawyers in the United States I wanted: Texas, Boston, anywhere * * * anything Mr. Nixdorf done is for Mr. Park. He's working for him: employed by him."

It is upon the above record, and in contravention of the reasoning of the Supreme Court of Georgia, that Park seeks habeas corpus, asserting that his conviction resulted from denial of his Sixth Amendment right to confront the witnesses against him.

In the District Court it was specifically stipulated by Park's counsel that the claimed violation of the Confrontation Clause, accomplished by admitting the declarations of the non-testifying Pinion and Worley, is the only issue upon which there had been state exhaustion, thus ripe for federal habeas corpus disposition.

There is an important distinction between the instant case and Dutton v. Evans, 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970). In Dutton's case, Section 38-306 of the Annotated Georgia Code was attacked on the ground that a part of its hearsay exception was constitutionally invalid in that it did not identically conform to the hearsay exception as applied to conspiracy trials in the federal courts, that is, the challenged statement in *Dutton* had been made *subsequently* to the commission of the homicide and while the alleged participants were attempting to conceal the identity of the actual murderers. Under federal conspiratorial exceptions to the hearsay rule the

evidence could not have been admitted; under the Georgia statute, in a state trial, it was admissible. It was argued that this aspect of the Georgia statute violated the Confrontation Clause.

To this, in a plurality opinion, with one Justice concurring in the result, the Supreme Court responded, "Appellee does not challenge and we do not question the validity of the coconspirator exception [to the hearsay rule] in the federal courts."

Moreover, the Supreme Court in its *Dutton* decision pointed out that Evans [in that case] was not being prosecuted for conspiracy but for the substantive offense of murder, that is, one in which he, according to eye witness testimony, actively participated.

In the instant case, the declarations of Pinion and Worley were made prior to the murder and while efforts were being made to cause it. To be specific, this was a typical conspiratorial situation. It did not involve declarations of co-conspirators made after the crime was committed.

This remands us to an evaluation of the views of the Supreme Court of Georgia in Park's case. The opinion there defined conspiracy, under Georgia law, as "A corrupt agreement between two or more persons to do an unlawful act", 162 S.E.2d 364, thus the conspiracy does not have to be one which is, of itself, explicitly defined and punishable as an independent criminal offense.

The Georgia Court continued, "It is not necessary that the crime of murder should be a part of the original design; but it is enough if it be one of the incidental probable consequences of the execution of their design. * * * * [The existence of a conspiracy] may be established by direct proof, or by inference, as a deduction from acts and conduct, which discloses a common design on their part to act together for the accomplishment of the unlawful purpose. In other words, the existence of the common design or purpose between two or more persons to commit an unlawful act may be shown by either direct or circumstantial evidence."

The Court further concluded that, "a conspiracy involving the defendant in the murder of Hoard was prima facie shown by such aliunde evidence, and the inferences and deductions therefrom."

Thus, we repeat, the instant case falls clearly within the four corners of conspiracy cases frequently encountered in both state and federal courts in which the declarations of co-conspirators made during the existence and furtherance of the conspiracy are admissible as an exception to the hearsay rule. As will later be seen, this has been uniformly held not to infringe on Sixth Amendment confrontation rights.

Our Panel was of the view that "There was no independent, non-hearsay evidence of Park's participation in the plot to kill Solicitor General Hoard; there was independent evidence only of Park's participation in a conspiracy to violate the State's alcoholic beverage law." We cannot agree, for the evidence

recited herein well supports the inference or deduction, which the jury accepted, that the killing was incidental to or in furtherance of the undisputed ongoing liquor conspiracy and was inescapably a part of it, for without the former there would have been no motive or reason for the ultimate event. The liquidation of the Solicitor General could well have been accepted by criminal minds as the only way to keep the illegal liquor conspiracy alive. The only other possible motive, revenge for prior interference and heavy fines, would have been a direct descendant of and inseparably linked by common bonds to the original conspiratorial activities. That the beginning unlawful conspiracy inseparably merged in the murder to us seems to be inescapable. There was no "combination of two conspiracies", as mentioned in the panel opinion.

Nor can we agree, as the Panel thought, that the declarations of the alleged co-conspirators were unsupported by indicia of reliability. Quite evidently, as indicated by its verdict, the jury found beyond a reasonable doubt that the Pinion and Worley statements had been made, that "the old man", Park, was the only man anywhere near this situation who was possessed of enough funds to finance the assassination. It was Pinion, his enforcer, who, by his declaration, had to go see "the old man" to settle a demand for an increased fee, with reported negative results. After the deed was done, it was Pinion who travelled to Seay's home and threw the $5,500 on the bed, departing without saying a word. There is not a whisper in the record that Pinion personally had or, on his own, could marshal such resources. Hoard had cost "the old man" $21,700 in

seized contraband and $6,300 in fines for himself and employees — compared to which a $5,000 hit fee would look relatively small, especially if it carried with it the hope of holding on to contraband not yet destroyed and of carrying on a rather major (and profitable) illegal operation in a dry county.

In the context of this case we attribute no constitutional significance to the failure of the State to call Pinion and Worley to the stand. Both men had denied their complicity in the murder. They had stood trial on it, maintaining their innocence. They were nevertheless convicted. It would have been a strange expectation, indeed, to anticipate that, if called, they would abandon their steadfast position and render assistance to those who had succeeded in consigning them to the penitentiary for life. Moreover, it is an inescapable assumption that counsel for the State and for Park knew what happened at the trials of these men. With this knowledge, neither side bothered to put either of them under subpoena. Even Blackwell and Seay, who had made their peace with the State in return for a life sentence, invoked the Fifth Amendment at the second trial, from which Blackwell never wavered, although Seay did withdraw from that position and took the stand.

The determinative point, as later developed, is that Seay was the only witness to the out of court statements of Pinion and Worley and as to this he was thoroughly cross-examined.

In the context of that already written, we turn to a discussion of some principles of controlling law,

applicable to cases such as this one. In doing so, there is no intention to rake the field or to attempt a treatise on the Confrontation Clause, or the law of conspiracy, or exceptions to evidentiary hearsay rules. What does appear is that the Georgia law applicable to cases of this kind completely tracks the federal law in such instances; we are unable to discern the first relevant distinction between the two.

The common law offense of conspiracy has not been incorporated in the Georgia Criminal Code, yet that Code specifically acknowledges the existence of conspiracies in Section 38-306, *supra*, by providing that "After the fact of conspiracy shall be proved, the declarations by any one of the conspirators during the pendency of the criminal project shall be admissible against all". It has been well established by numerous Georgia cases that despite the failure of the Code to denounce the common law offense of conspiracy, a conspiracy may nevertheless be an incident of and one of the means by which a substantive crime may be accomplished, including the crime of murder. For a detailed history and analysis of this legal proposition see Weeks v. State, 66 Ga.App. 553, 18 S.E.2d 503 (1942), and the cases there discussed.

We are thus convinced that the application of the standard exception to the hearsay rule as to conspiracies in this case did not depend upon the existence of a statute making conspiracy a crime in and of itself. This view is bolstered by the plain federal law on the subject, the constitutionality of which seems never to have been successfully challenged.

Indeed, the admissions and statements of a co-defendant are admissible as against the other defendant, even in the absence of a conspiracy count, *where there is independent evidence of a concert of action*. Clearly, once such concert of action is independently shown, hearsay statements in furtherance of that relationship are admissible in evidence. United States v. Williams, 9 Cir., 1970, 435 F.2d 642. The threshold requirement for admissibility is satisfied by a showing of a likelihood of an illicit association between the declarant and the defendant. United States v. Ragland, 2 Cir., 1967, 375 F.2d 471. The independent evidence of illicit association may be totally circumstantial. United States v. Garguilo, 2 Cir., 1962, 310 F.2d 249; United States v. Ragland, *supra*.

In United States v. Williams, *supra*, 435 F.2d at page 645, the Court cited United States v. Olweiss, 2 Cir., 1943, 138 F.2d 798, 800, cert. denied, 321 U.S. 744, 64 S.Ct. 483, 88 L.Ed. 1047 (1943), in which Judge Learned Hand stated:

> "It was proper to charge them as principals — which they probably were in 'any event — even though they were only accessories. (§ 550, Title 18, U.S.C.A.); and any evidence admissible against Olweiss was admissible against them, so far as it consisted of conduct in furtherance of the joint venture in which all three were engaged. The notion that the competency of the declarations of a confederate is confined to prosecutions for conspiracy has not the slightest basis; * * *."

The common design which is the essence of conspiracy may be made to appear when the parties steadily pursue the same object, whether acting separately or together by common or different means, ever leading to the same unlawful result. United States v. Gordon, 7 Cir., 1944, 138 F.2d 174, cert. denied, 320 U.S. 798, 64 S.Ct. 266, 88 L.Ed. 481. Presenting evidence of violations of different statutes does not create separate conspiracies out of one conspiracy. The gist of the matter is an agreement to commit unlawful acts. United States v. Noah, 9 Cir., 1973, 475 F.2d 688. Of critical importance, the character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by *looking at it as a whole*. Carlson v. United States, 10 Cir., 1951, 187 F.2d 366, cert. denied, 341 U.S. 940, 71 S.Ct. 1000, 95 L.Ed. 1367.

A conspiracy is a partnership in crime and so long as that partnership continues the partners act for each other in carrying it forward; an overt act of one partner may be the act of all even without any new agreement specifically directed to that particular act. Pinkerton v. United States, 328 U.S. 640, 66 S.Ct. 1180, 90 L.Ed. 1489 (1946).

Participation in a criminal conspiracy may be shown by circumstantial as well as direct evidence. Delli Paoli v. United States, 352 U.S. 232, 77 S.Ct. 294, 1 L.Ed.2d 278 (1957). A party's stake in an alleged conspiracy is relevant to the question of whether he participated therein, Direct Sales Co. v. United States, 319 U.S. 703, 63 S.Ct. 1265, 87 L.Ed. 1674 (1943).

Once the existence of the common scheme of a conspiracy is shown, slight evidence is all that is required to connect a particular defendant with the conspiracy. United States v. Lee, 5 Cir., 1973, 483 F.2d 968.

Conspiracy is almost always a matter of inference deduced from the acts of the persons accused, which are done in pursuance of an apparent criminal purpose, and proof need go no further than reach that degree of probability where the general experience of men suggests that it has passed the mark of reasonable doubt. Blumenthal v. United States, 9 Cir., 1947, 158 F.2d 883, affirmed 332 U.S. 539, 68 S.Ct. 248, 92 L.Ed. 154.

From the foregoing, we are totally convinced that the theory upon which Georgia prosecuted Park and upon which the jury convicted him is legally unassailable.

This leaves only the question of whether the conviction was obtained at the expense of the Confrontation Clause of the Sixth Amendment, a fundamental right made obligatory on the states by the Fourteenth Amendment. Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965).

The general facts and circumstances of the conspiracy which led to the murder were developed by live witnesses, duly subjected to cross-examination, presenting no issue of confrontation.

The confrontation attack is centered upon the admission, through the testimony of Lloyd Seay, of

statements made by co-conspirators Douglas Pinion, and George Worley before the murder was committed. As to this, Seay was subjected to the most rigorous and searching cross-examination. This is exactly what the Confrontation Clause guarantees, see, e.g., Nelson v. O'Neil, 402 U.S. 622, 91 S.Ct. 1723, 29 L.Ed.2d 222 (1971). A conspirator's declaration in furtherance of the conspiracy may be used against another conspirator not present on the theory that the declarant is the agent of the other, and the admissions of one are admissible against both as a standard exception to the hearsay rule. Delli Paoli v. United States, *supra*; Lutwak v. United States, 344 U.S. 604, 73 S.Ct. 481, 97 L.Ed. 593 (1953). The issue was whether Pinion and Worley had made the statements. Seay was the only witness who swore that they had. He was cross-examined at length and in detail. That puts an end to the confrontation argument in this case.

We need not linger long over certain issues not reached by the Panel in its decision.

After they had invoked the Fifth Amendment at the second trial, there was no error in the use of the transcripts of the testimony of Blackwell and Seay given at the former trial in which both had been cross-examined by the same defense counsel who appeared at the second trial. United States v. Mobley, 5 Cir., 1970, 421 F.2d 345.

The use of Blackwell's confession is no cause for intervention in this case as it nowhere mentioned the defendant Park. White v. United States, 5 Cir., 1969, 415 F.2d 292.

The judgment of the District Court denying the appellant Park habeas corpus relief is

Affirmed.

Since Park is now at large on bail, pending the outcome of this appeal, the mandate will issue

Forthwith.

GEWIN, Circuit Judge (concurring specially):

Reluctantly, I concur in the result reached by the majority in this case. In my view, this special concurrence is impelled by the Supreme Court's plurality opinion in Dutton v. Evans, 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970), and the decision of this court en banc in Hoover v. Beto, 467 F.2d 516 (1972), cert. denied, 409 U.S. 1086, 93 S.Ct. 703, 34 L.Ed.2d 673. Were it not for those two decisions, I would join with my dissenting Brothers.

The plurality opinion in *Evans* concluded that no error was committed in the trial of Evans on a capital offense when the state was allowed to prove by a witness named Shaw that Williams, a co-conspirator with Evans, made the statement, "If it hadn't been for that dirty son of a bitch Alex Evans, we wouldn't be in this now." The Court concluded that the Georgia hearsay statute and Georgia decisions authorized the admissibility of the statement. Some of the Justices seemed to assign as an additional reason for admissibility the fact that the statement by Williams "did not misrepresent Evans' involvement in the

crime." Two Justices thought the admission of the statement was harmless error because it was "so incredible that the testimony must have hurt, rather than helped, the prosecution's case." It is rather significant that four Justices concluded that the Georgia rule satisfied the right of confrontation (opinion of Justice Stewart concurred in by Chief Justice Burger, Justices White and Blackmun). Four other Justices disagreed with that conclusion (opinion of Justice Marshall, concurred in by Justices Black, Douglas and Brennan). The deciding vote was cast by Justice Harlan who refused to apply Sixth Amendment standards to the Georgia statute and Georgia decisions interpreting it, but considered the question as posing an issue of due process. It seems fair to say that there is no clear holding of the Court except as to the result reached.

It is interesting to note that at the time of trial, the witness Williams was in the custody of the state of Georgia and easily available to the state. The murder for which Evans was being tried had been committed for over a year. The purpose of the conspiracy had been accomplished. The facts were known, and therefore, the statement by Williams could not have aided in the concealment of the conspiracy. Indeed, Truett, a participant in the murder, who had been granted full and complete immunity and was the principal prosecution witness, testified fully as to Evans' involvement. As the court stated in Fiswick v. United States, 329 U.S. 211, 217, 67 S.Ct. 224, 227, 91 L.Ed. 196, 200 (1946), "[C]onfession or admission by one co-conspirator after he has been apprehended is not in

any sense a furtherance of the criminal enterprise. It is rather a frustration of it." Nevertheless, the plurality opinion in *Evans* sustains the admissibility of the statement under the Georgia rule which allows such evidence because it is deemed to be in furtherance of the conspiracy or in concealment of it. Whether the statement be considered incredible as some of the Justices seemed to think or as a true representation of Evans' involvement in the crime as others apparently thought, it is surely not complimentary of a defendant standing trial on any charge, especially a capital offense, to be characterized as "a dirty son of a bitch" and to be accused as the person who caused the trouble.

Similarly, this court in *Hoover* permitted the state to introduce into evidence the confession of Calvin Sellars, one of the principals involved, through the mouth of Officer C. V. Stone. Officer Stone was allowed to testify as to what Sellars had said to him, which seriously implicated Hoover even though Sellars was not shown to be unavailable to the state as a witness.

If the hearsay statement made by Williams was admissible against Evans and if the hearsay statement made by Sellars was admissible against Hoover, notwithstanding the confrontation provision of the Sixth Amendment, I am compelled to concur in the result reached by the majority which approves the admission of damaging hearsay statements by witnesses who never confronted Park.

Although I feel bound to concur in the result reached by the majority, I must pause to pay some obeisance to

the confrontation clause. Except for the cases cited, I could not agree that an accused be deprived of the right to confront and be confronted by the witnesses against him. The confrontation clause of the Sixth Amendment arose out of ominous circumstances in the history of the common law. In 1586, Mary, Queen of Scots, was convicted in a star chamber proceeding chiefly on documentary evidence which she claimed was forged, but she was unable to interrogate those who had written the documents. Sir Walter Raleigh[1] was convicted upon hearsay evidence in 1603 and ultimately executed fifteen years after trial. He pled for the right of confrontation in these words:

> "If I knew any of these things, I would absolutely confess the indictment and acknowledge myself worthy a thousand deaths. Why, then, my Lords, let my accuser be brought and let me ask him a question and I have done; for it may appear from his own relation that his accusation cannot be true, or he may be discovered by examination. If you condemn me upon bare inferences and will not bring my accuser to face, you try me by no law, but by a Spanish inquisition. If my accuser were dead or out of the realm, it were something; but my accuser lives and is in the house, and yet you will not bring him to my face."[2]

Raleigh's plea was made a vital part of our law in the Sixth Amendment.

1 *See* F. Heller, The Sixth Amendment 104 (1901).

2 R. Raby, Fifty Famous Trials 17 (1937).

Moreover, since I am bound by the result reached in *Evans* and in *Hoover*, there is another reason why I am constrained to concur in the result of the majority, even if I would not do so absent the two decisions mentioned. There yet remains in our law a viable principle which requires respect for the decisions of the highest tribunals of a state once it is concluded that a Constitutional issue is not presented. It is a hazardous undertaking for federal courts to overturn the conclusion of state courts unless the Supremacy Clause requires such action.

In Avery v. Alabama, 304 U.S. 444, 60 S.Ct. 321, 84 L.Ed. 377 (1939) the defendant was convicted of murder, sentenced to death and his conviction was affirmed by the Supreme Court. Avery was tried in 1938 for a murder alleged to have been committed in 1932. He was arraigned on Monday; two practicing attorneys were appointed to defend him; pleas of not guilty and not guilty by reason of insanity were entered and the case was set for trial on Wednesday. The case was not reached on Wednesday but the trial actually commenced on Thursday. Appointed counsel moved for a continuance on the ground they had not had sufficient time and opportunity to investigate the case and prepare a defense. One of the appointed attorneys supported the motion for continuance on the ground that he had been substantially engaged in court on Monday, Tuesday and Wednesday. Under these facts the Supreme Court concluded:

> "Under the circumstances of this case we cannot say that the trial judge, who concluded a fairly conducted trial by carefully safeguard-

> ing petitioner's rights in a clear and fair charge, deprived petitioner of his constitutional right to assistance of counsel. The Supreme Court of Alabama having found that petitioner was afforded that right, its judgment is Affirmed."

308 U.S. at 453, 60 S.Ct. at 325, 84 L.Ed. at 383

Again in Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), the Court evidenced a profound respect for the judgment of a state appellate court. In *Brady* it is important to remember that the Court only held that the suppression of the accomplice's confession violated the due process clause of the Fourteenth Amendment. The Court also concluded that neither the due process clause nor the equal protection clause of that amendment was violated by restricting the new trial, which it ordered, to the question of punishment only. Justice Douglas aptly stated:

> "We usually walk on treacherous ground when we explore state law, for state courts, state agencies, and state legislatures are its final expositors under our federal regime." (footnote omitted)

373 U.S. at 90, 83 S.Ct. at 1198, 10 L.Ed.2d at 220.

WISDOM, Circuit Judge, with whom GOLDBERG, GODBOLD, SIMPSON and RONEY, Circuit Judges, join, dissenting:

I reaffirm the views expressed in the panel opinion, 5 Cir., 493 F.2d 923. I join in my brother Thornberry's dissenting opinion. I add a few words of my own because the majority opinion shows an egregious misunderstanding of the Confrontation Clause.

The only links between Park and the murder are the hearsay statements Pinion and Worley are supposed to have made to Seay. The majority opinion blithely dismisses the significance of this fact in one paragraph with a quick wave of the pen:

> "As to this, Seay was subjected to the most rigorous and searching cross-examination. This is exactly what the Confrontation Clause guarantees."

Incredible! Of course, what the Confrontation Clause guarantees is Park's right to examine Pinion and Worley — not just Seay.

Continuing on its errant way, the majority states:

> "The issue was whether Pinion and Worley had made the statements. Seay was the only witness who swore that they had. He was cross-examined at length and in detail. That puts an end to the confrontation argument in this case."

But the issue was *not* whether Pinion and Worley had made the statements. They may have done so. They may have wished to lighten their burden by shifting the heaviest part of it to someone else: Park was a

logical choice. The issue was the truth or falsity of their statements. Park was entitled to confront these accusers. The United States Constitution guarantees him this right, regardless of the willingness of Georgia courts to admit the statements by attenuating the co-conspirator exception to the bar against hearsay.

The utility of an exception to the rule against hearsay depends on the reliability of the hearsay and the need for such evidence. The reliability of a co-conspirator's out-of-court statement is shaky at best. It is shakier when the only conspiracy proved was to commit a misdemeanor, here to sell liquor in a dry county. To allow Park to be found guilty of murder on the crucial, devastating out-of-court statements of two men who were never brought into court to testify, although they were in prison and therefore available to testify, shocks me. I doubt that this could happen in any other civilized country. I had thought that it could not happen here.

THORNBERRY, Circuit Judge, with whom WISDOM, GOLDBERG, GODBOLD, SIMPSON and RONEY, Circuit Judges, join, dissenting:

I cannot subscribe to the majority opinion's analysis and respectfully register my dissent.

The majority opinion properly looks to the Georgia court decisions in this case to determine the elements of proof required to convict Park of murder. Yet the opinion does not follow that analysis through to its logical conclusion. The net result is an opinion that, in my view, ignores the very first principles of the Supreme Court's confrontation clause decisions.

The Georgia Supreme Court's first opinion attempts to set out the elements of proof under Georgia law required to convict Park. Park v. State, 224 Ga. 467, 162 S.E.2d 359 (1968). It is clear that the State's theory of the case was that the murder was committed in furtherance of the liquor conspiracy. Under that theory, the State had only to show beyond a reasonable doubt that Park participated in the liquor conspiracy. Then, applying the principle of Pinkerton v. United States, 328 U.S. 640, 66 S.Ct. 1180, 90 L.Ed. 1489 (1946), Park was guilty of murder without regard to his actual knowledge of or his active participation in the murder plot.

Arguably the Georgia Supreme Court adopted the State's theory, and the majority opinion here apparently construes the state court opinion in that fashion. Under that theory, I do not feel this case presents a significant confrontation problem. There was a wealth of evidence to connect Park with the liquor conspiracy. If the State could obtain a murder conviction merely by showing Park's connection with the liquor conspiracy, then Pinion's statements were neither "crucial" to the prosecution's case nor "devastating" to Park's defense. The case would present a confrontation question very similar to Dutton v. Evans, 400 U.S. 74, 91 S.Ct. 210, 276 L.Ed.2d 213 (1970), and I would think the confrontation question here properly resolved under the rationale of the *Dutton* plurality, or on a harmless error theory.

I think Park might raise due process objections to the validity of his murder conviction on the *Pinkerton* theory. *See* Developments in the Law — Conspiracy, 72 Harv.L.Rev. 920, 993-98 (1959). However, as the ma-

jority notes, the confrontation clause issue is the only question ripe for habeas corpus disposition, and Park should first present any due process arguments to the Georgia courts.

My reading of the Georgia Supreme Court opinion, however, convinces me that the Georgia Supreme Court required proof of Park's connection with the murder plot for conviction. The court rejects Park's claim of entitlement to a directed verdict of acquittal on the basis that there was evidence of Park's participation "*in a conspiracy to murder Hoard.*" Park v. State, 224 Ga. 467, 468, 162 S.E.2d 359, 361 (1968). Further the court required corroboration of Seay's testimony since he was an accomplice to the murder. In summarizing the evidence on corroboration the court states, "The evidence relied upon by the State as corroborating the testimony of the accomplice Seay tended to connect Park with the murder and was sufficient to support his conviction." 224 Ga. at 477, 162 S.E.2d at 366. If the Georgia court only required proof of Park's participation in the liquor conspiracy, corroboration of Seay's testimony would not be essential to sustain the conviction.

If the Georgia opinion required proof of Park's participation in the murder plot, then I feel this case presents a confrontation problem significantly different from *Dutton*. The out of court statements of Pinion and Worley provided the only evidence linking Park to the *murder* conspiracy. The Georgia Supreme Court's decision there allowed the State to use out of court statements against Park to establish an essential element of its case. Those statements were clearly

crucial to the prosecution's case, and Park never had the opportunity to confront and cross-examine the makers of those statements.[1]

The majority feels the confrontation clause requirements are met here. The opinion states:

> The confrontation attack is centered upon the admission, through the testimony of Lloyd Seay, of statements made by co-conspirators Douglas Pinion, and George Worley before the murder was committed. As to this, Seay was subjected to the most rigorous and searching cross-examination. This is exactly what the Confrontation Clause guarantees, see, e. g., Nelson v. O'Neil, 402 U.S. 622, 91 S.Ct. 1723, 29 L.Ed.2d 222 (1971).

I most vigorously disagree. Park's opportunity to cross-examine Seay does *not* satisfy the confrontation clause. Seay did not make the inculpatory statements, and there cross-examining him as to their meaning is fruitless. It is Pinion and Worley who are the witnesses against Park for Sixth Amendment purposes. The situation in Nelson v. O'Neil was completely different. There, Runnels, the out of court declarant, took the stand, and was subject to cross examination. Here Pinion and Worley, the makers of the ex-

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1 As the panel opinion noted, Pinion and Worley were not shown to be unavailalb.e Each had either exhausted his appellate remedies, or failed to appeal his murder conviction. I do not believe that either man could validly have claimed a fifth amendment privilege. The mere possibility of future collateral attack should not give rise to a valid claim of privilege after final conviction. *See* Reina v. United States, 364 U.S. 507, 513, 81 S.Ct. 260, 5 L.Ed.2d 249 (1960); United States v. Romero, 249 F.2d 371, 375 (2d Cir. 1957); 8 Wigmore, Evidence § 2279 (McNaughton Rev. 1961).

trajudicial statements, never testified, and could not be examined as to their perception, memory, narration, and sincerity. *See* Morgan, Hearsay Dangers and the Application of the Hearsay Concept, 62 Harv.L.Rev. 177, 218 (1948). The majority feels that Seay's status as a co-conspirator makes him the agent of Pinion and Worley. The majority reasons that Park's opportunity to cross-examine the "agent" was the confrontation clause equivalent of cross examining the declarants. This is a novel confrontation clause concept to which I do not subscribe.

I think Judge Wisdom's panel opinion makes the proper confrontation clause analysis in this case. For the reasons given in that opinion, I would reverse the district court's denial of Park's habeas corpus petition.

APPENDIX B

United States Court of Appeals
For the Fifth Circuit

October Term, 1974

No. 73-1897

D. C. Docket No. CA 1477

A. C. PARK,
Petitioner-Appellant,

versus

H. T. (TOMMY) HUFF,
Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Georgia

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Before BROWN, Chief Judge, and WISDOM, GEWIN, BELL, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, SIMPSON, MORGAN, CLARK, RONEY, and GEE, Circuit Judges.

JUDGMENT ON REHEARING EN BANC

This cause came on to be heard on respondent-appellee's petition for rehearing en banc. and was argued by counsel:

ON CONSIDERATION WHEREOF. It is now here ordered and adjudged by this Court that the judgment of the panel of this Court is reversed. and that the judgment of the said District Court is hereby affirmed.

January 20. 1975

GEWIN. Circuit Judge. specially concurring.

WISDOM. Circuit Judge. with whom GOLDBERG. GODBOLD. SIMPSON and RONEY. Circuit Judges. join. dissenting.

THORNBERRY. Circuit Judge. with whom WISDOM. GOLDBERG. GODBOLD. SIMPSON and RONEY. Circuit Judges. join. dissenting.

Issued as Mandate: JAN. 20. 1975

APPENDIX C

A. C. PARK.
Petitioner-Appellant.

versus

H. T. (Tommy) HUFF.
Respondent-Appellee.

No. 73-1897.

United States Court of Appeals.
Fifth Circuit.

May 6. 1974.

Appeal from the United States District Court for the Northern District of Georgia.

Before WISDOM. COLEMAN and SIMPSON. Circuit Judges.

WISDOM. Circuit Judge:

A. C. Park. the petitioner-appellant. was convicted in a Georgia court of murdering a local prosecuting attorney. The evidence against him consisted of hearsay statements introduced under Georgia's co-conspirator exception to the hearsay rule. After his

conviction was affirmed by the Georgia Supreme Court. Park sought federal habeas corpus relief. The district court denied Park's petition. The hearsay testimony introduced against Park was "crucial" and "devastating" under Dutton v. Evans, 1970, 400 U.S. 74, 87, 91 S.Ct. 210, 27 L.Ed.2d 213; it was unreliable; and the State made no showing that the declarants were unavailable to testify at trial. The introduction of the hearsay testimony, therefore, violated the accused's Sixth Amendment right of confrontation. We reverse.

I.

Between 7:00 and 7:30 in the morning on August 7, 1967, Floyd Hoard, the Solicitor General of the Piedmont Judicial Circuit in Georgia, was killed when dynamite wired to the ignition system of his car exploded. After a four-month investigation, a grand jury in Jackson County, Georgia, indicted five persons for the murder: Douglas Pinion, J. H. Blackwell, Lloyd George Seay, George Ira Worley, and Park. The prosecution's theory was that the killing had been accomplished through a three-tiered conspiracy — Blackwell, Seay, and Worley had purchased the dynamite and wired it to the coil of Hoard's car; Pinion had paid the three $5,500 for the murder; and Park had been the prime mover of the project and had furnished at least $5,000 of the purchase price. As a motive for the killing, the State postulated Hoard's recent law-enforcement activities against Park, Pinion, and Seay, who were operating on a large scale the business of selling liquor in a dry county. Hoard had had Park's

home and an adjacent building raided, had instituted padlock proceedings against Park, had confiscated a great quantity of illegal alcohol, and had filed criminal charges against Park. Park had paid fines totalling $6,300. Park, Pinion, and Seay had been engaged in their illegal liquor business for many years. There was testimony that Pinion acted as Park's "enforcer" and that he used guns and administered beatings in the prosecution of their illicit business. On the day of his death Hoard had planned to present evidence against the liquor conspiracy to a grand jury.

Seay and Blackwell pleaded guilty to murder; Pinion and Worley were convicted of murder after trial. All were sentenced to life imprisonment. Park entered a plea of not guilty and was tried separately. He denied any knowledge of the murder and stated to the jury that he had not seen or talked with Seay for at least two years before Hoard's death.

Worley and Pinion did not testify at Park's trial. Blackwell and Seay testified for the State[1]. Blackwell's testimony was largely corroborative; he had never seen nor talked with Park. But Seay's testimony was determinative. Indeed, the only evidence directly implicating Park in the slaying came from Seay's lips. Seay related several critical conversations he had had with other alleged members of the conspiracy. The

1 The State offered to recommend that Blackwell receive a life sentence, provided that he would testify "fully, fairly, and completely". Whether or not Seay received a similar offer for his testimony is not clear. Park v. State, 1968, 224 Ga. 467, 469, 162 S.E.2d 359, 362, cert. denied, 393 U.S. 980, 89 S.Ct. 449, 21 L.Ed.2d 441.

testimony most damaging to Park were out-of-court declarations by Pinion. According to Seay, Pinion told him that "a man" wanted Hoard "done away with" and was willing to pay $5,000. Seay responded that he would "check around for him and see if anybody wanted to do it". Seay spoke to Worley who said he would murder Hoard, but he wanted $7,500 instead of $5,000. Seay then went back to Pinion and told him that he had found someone to do the job for $7,500. Pinion responded that he did not think "the man" would pay more than $5,000, but that he would inquire. Pinion left and was gone about forty-five minutes. When he returned he told Seay, "[T]he old man won't go up any more. I will put $500 on it. Make it $5,500." It was established at trial that Park was generally known in the community as the "old man". The only other evidence directly implicating Park in the murder scheme was Seay's testimony that Worley had said that, if Seay did not go through with the killing, the "old man" would have "something done" to him or to his family[2]. Seay testified that "other than what Doug Pinion told" him he knew nothing as to Park's "having any connection with" the money given him by Pinion, and other than that "he had no contact with Mr. Park at all with respect to any killing".

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2 Seay also testified that Pinion had told him after the murder that the "old man" was worried and had asked him who had participated in the murder. Park, however, might have been worried and curious to know who had participated without necessarily having been a party to the conspiracy to murder Hoard.

Park was found guilty and sentenced to death. The Georgia Supreme Court reversed, because Park had been improperly deprived of his right to make the opening and closing argument to the jury[3].

At Park's second trial the State called Blackwell as a witness. He refused to be examined on any matter, stating, "I stand on the Fifth Amendment". His sworn testimony at the original trial was read to the jury. An agent of the Georgia Bureau of Investigation, testifying for the State, related the contents of a confession Blackwell had given to him. The statement did not refer, even inferentially, to Park.

Seay was also again called as a witness for the State. After stating his name and place of incarceration, he refused to answer further questions, relying on his Fifth Amendment privilege against self incrimination. Over Park's objection, the State read to the jury the transcript of Seay's testimony at the first trial. Later, Seay was recalled to the witness stand, and on direct examination he repeated his testimony con-

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3 The Georgia Code, § 27-2201 provides:

> "After the testimony shall have been closed on both sides, the State's counsel shall open and conclude the argument to the jury, except that, if the defendant shall introduce no testimony, his counsel shall open and conclude after the testimony on the part of the State is closed."

The trial court denied opening and closing arguments to Park because, in making an unsworn statement denying any connection with the homicide, he referred to and displayed several documents. The Georgia Supreme Court held that a defendant does not lose his right to make opening and closing argument by exhibiting documents without formally introducing them in evidence. Park v. State, 162 S.E.2d 368.

cerning his conversations with Pinion and Worley[4]. Seay's testimony with regard to these critical conversations was introduced a third time through an agent of the Georgia Bureau of Investigation, who related the content of Seay's confession to him. Neither Pinion nor Worley was called as a witness. Park was again convicted and sentenced to death, and this time the Georgia Supreme Court affirmed[5]. The United States Supreme Court, without ruling on the merits, vacated the judgment insofar as it left undisturbed the death penalty imposed, and directed further proceedings consistent with Stewart v. Massachusetts, 1972, 408 U.S. 845, 92 S.Ct. 2845, 33 L.Ed.2d 744[6]. Park was resentenced to a life term[7]. He then filed in the district court a petition for a writ of habeas corpus. The court denied his petition. Park appeals, contending that his right to confrontation was violated by the introduction into evidence of the inculpatory hearsay statements Seay attributed to Pinion and Worley[8].

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4 In his live testimony at the second trial Seay related that Pinion had said he was going to inquire from the "old man", not the "man", whether the $5,000 figure could be increased. Seay did not mention in this testimony Pinion's alleged statement after the murder concerning Park's question about who had participated in the slaying. See note 2 *supra*.

5 Park v. State, 1969, 225 Ga. 618, 170 S.E.2d 687.

6 Park v. Georgia, 1972, 408 U.S. 935, 92 S.Ct. 2845, 33 L.Ed.2d 749.

7 Sullivan v. State, 1972, 229 Ga. 731, 194 S.E.2d 410.

8 Park also maintains that the Georgia trial court committed error by admitting the transcript of testimony given at the first trial and by permitting the agent of the Georgia Bureau of Investigation to relate the substance of a confession given by an alleged co-conspirator out of Park's presence. We do not reach these issues.

II.

"Hearsay" is defined as a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted". Federal Rules of Evidence, rule 801 (1972). Most definitions are substantially similar. See United States v. Williamson, 5 Cir. 1971, 450 F.2d 585, 589, cert. denied, 405 U.S. 1026, 92 S.Ct. 1297, 31 L.Ed.2d 486; ALI, Model Code of Evidence, Rule 501; McCormick, Law of Evidence § 246 (2d ed. 1972); 5 Wigmore, Evidence § 1361 (3d ed. 1940); 6 *id.* § 1766. Taking these definitions literally, the statements of Pinion and Worley, recounted by Seay, were analogous to but not identical with typical hearsay in that they were not "offered to prove the truth of the matter asserted"; whether in fact the "old man" would raise the ante or would have "something done" to Seay's family if he did not cooperate was beside the point. The out-of-court statements of Pinion and Worley, however, clearly implied that Park was involved in the conspiracy to murder Solicitor General Hoard. As proof of Park's guilt the statements formed evidence just as damaging as direct declarations that Park was a leading member of the murder conspiracy. And the truth of the implication depended on the credibility, the trustworthiness, of the declarants who were not subject to cross-examination. See Favre v. Henderson, 5 Cir. 1972, 464 F.2d 359, 362, cert. denied, 409 U.S. 942, 93 S.Ct. 235, 34 L.Ed.2d 193. Twenty-five years ago, Professor Morgan analyzed the hearsay rule and identified its rationale as based on the untrustworthiness of hear-

say statements: "[S]hould we not recognize that the rational basis for the hearsay classification is not the formula, 'assertions offered for the truth of the matter asserted,' but rather the presence of substantial risks of insincerity and faulty narration, memory, and perception?" Morgan, Hearsay Dangers and the Application of the Hearsay Concept, 62 Harv.L.Rev. 177, 218 (1948).[9]

Implied assertions may in certain circumstances carry less danger of insincerity or untrustworthiness than direct assertions, see United States v. Pacelli, 2 Cir. 1974, 491 F.2d 1108 at 1116, but not always. The danger of insincerity or untrustworthiness is decreased only where there is no possibility that the declarant intended to leave a particular impression. Finman, Implied Assertions as Hearsay: Some Criticisms of the Uniform Rules of Evidence, 14 Stan.L.Rev. 682, 686 (1962); Rucker, The Twilight Zone of Hearsay, 9 Vand.L.Rev. 453, 478 (1956). Here we cannot exclude that possibility;[10] Pinion's and Worley's statements carry the implication that they mentioned the "old man" to Seay with the intention of com-

9 Morgan has of course no doubt as to his answer:

> "[I]n any attempt to define the limits of hearsay, or to determine the advisability of creating exceptions to the rule excluding it, attention should be directed chiefly to the dangers which, in the class of cases under consideration, an opportunity to cross-examine might enable the adversary to eliminate."

Morgan, Hearsay and Non-Hearsay, 48 Harv.L.Rev. 1138, 1138-39 (1935).

10 See pp. 3618-3620 infra.

municating to him, as a fact, Park's participation in the plot.

When the possibility is real that an out-of-court statement which implies the existence of the ultimate fact in issue was made with assertive intent, it is essential that the statement be treated as hearsay if a direct declaration of that fact would be so treated. Baron Parke made an observation to that effect more than a century ago in the famous case of Wright v. Tatham, 1837, 7 Adolphus & E. 313, 388-89, 112 Eng.Rep. 488, 516-17:

> "[P]roof of a particular fact, which is not of itself a matter in issue, but which is relevant only as implying a statement or opinion of a third person on the matter in issue, is inadmissible in all cases where such a statement or opinion not an oath would be of itself inadmissible".

Were the rule otherwise, the hearsay rule could easily be circumvented through clever questioning and coaching of witnesses, so that answers were framed as implied rather than as direct assertions. The federal courts have consistently considered such implied assertions to be hearsay. See Krulewitch v. United States, 1949, 336 U.S. 440, 442, 69 S.Ct. 716, 93 L.Ed. 790; United States v. Pacelli, 491 F.2d at 1116-1117; Favre v. Henderson, 464 F.2d at 362; United States v. Williamson, 450 F.2d at 590. Georgia treats implied assertions similarly. When the Georgia Supreme Court con-

sidered the issue in the two *Park* cases, the Court assumed that Seay's testimony as to Pinion's and Worley's statements was hearsay.

III.

Classified as hearsay, Seay's recitation of his conversations with Pinion and Worley was admitted into evidence under Georgia's co-conspirator exception to the hearsay rule.[11] The Georgia Code provides that "[a]fter the fact of conspiracy shall be proved, the declarations by any one of the conspirators during the pendency of the criminal project shall be admissible against all." Ga.Code Ann. § 38-306. Georgia courts have interpreted the co-conspirator exception to permit the introduction of hearsay statements made after the alleged co-conspirators have been arrested and the sole continuing object of the conspiracy is to avoid punishment. See, e. g., Evans v. State, 1966, 222 Ga. 392, 399, 150 S.E.2d 240, 248, cert. denied, 385 U.S. 953, 87 S.Ct. 336, 17 L.Ed.2d 231; Carter v. State, 1809, 106 Ga. 372, 376, 32 S.E. 345, 347. Before such evidence may be admitted, however, Georgia requires that the conspiracy and the defendant's participation in it be proved by evidence independent of the hearsay testimony. Lanier v. State, 1939, 187 Ga. 534, 542-543, 1 S.E.2d 405, 410. There was no independent, non-hearsay evidence of Park's participation in the plot to

11 For a discussion of the various rationales behind the co-conspirator exception, see Developments in the Law — Criminal Conspiracy, 72 Harv.L.Rev. 920, 988-89 (1959).

kill Solicitor General Hoard; there was independent evidence only of Park's participation in a conspiracy to violate the State's alcoholic beverage law. The Georgia Supreme Court combined the two conspiracies. The conspiracy to murder Hoard, the court found, was in furtherance of the liquor conspiracy; the hearsay testimony against Park was therefore admissible. Park v. State, 1968, 224 Ga. 467, 474-475, 162 S.E.2d 359, 365, cert. denied, 393 U.S. 980, 89 S.Ct. 449, 21 L.Ed.2d 441.

That Seay's testimony was admissible under Georgia's co-conspirator exception does not, however, assure that the testimony was properly admissible when viewed against the constitutional standard of the confrontation clause of the Sixth Amendment. "[P]roper admission of evidence under an exception to the hearsay rule does not relieve a federal court considering a state criminal conviction from the responsibility for reviewing all the facts of the case in light of governing federal constitutional principles." Phillips v. Neil, 6 Cir. 1971, 452 F.2d 337, 345, cert. denied, 409 U.S. 884, 93 S.Ct. 96, 34 L.Ed.2d 141. In California v. Green, 1970, 339 U.S. 149, 155-156, 90 S.Ct. 1930, 26 L.Ed.2d 489, and Dutton v. Evans, 1970, 400 U.S. 74, 81-82, 91 S.Ct. 210, 27 L.Ed.2d 213, the Supreme Court emphasized that the hearsay rule and the confrontation clause are not congruent.[12] See also Favre v. Henderson, 464 F.2d at 363.

12 The confrontation clause of the Sixth Amendment is applied to the states through the fourteenth. Pointer v. Texas, 1965, 380 U.S. 400, 403, 85 S.Ct. 1065, 13 L.Ed.2d 923. "The refusal to equate the sixth amendment with the hearsay rule thus applies equally to federal and state prosecutions." United States v. Cerone, 7 Cir. 1971, 452 F.2d 274, 283, cert. denied, 405 U.S. 964, 92 S.Ct. 1168, 31 L.Ed.2d 240.

Testimony may be introduced in violation of the hearsay rule without violating the accused's right of confrontation, and testimony introduced under a traditional state exception to its hearsay rule may run afoul of the constitutional provision. The lesson is a plain one: whereas a state's hearsay rule and its exceptions may be administered by rote, the confrontation clause is responsive to the real and varying needs of the trial process. As Justice Stewart observed in *Dutton:*

> "The decisions of this Court make it clear that the mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that 'the trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement.' California v. Green, 399 U.S. at 161, 90 S.Ct. at 1936, 26 L.Ed.2d at 499."

400 U.S. at 89.

The appellee urges us to compare Seay's hearsay testimony with the federal co-conspirator exception, implying that if we found Seay's testimony admissible under the federal rule, our analysis would need to proceed no further. The thrust of this suggestion is that the federal hearsay rule and its exceptions provide a constitutionally acceptable minimum protection to the accused under the confrontation clause and that only testimony which falls outside the federal boundaries need be examined more closely under *Green* and *Dutton*. For this proposition the

appellee relies on language in the plurality opinion in *Dutton:* "Appellee does not challenge and we do not question the validity of the coconspirator exception applied in the federal courts." 400 U.S. at 80. It is true, as the appellee here points out, that the First Circuit has read that language as a statement that evidence admitted in federal court under the federal co-conspirator exception automatically complies with the requirements of the confrontation clause. See Ottomano v. United States, 1 Cir. 1972, 468 F.2d 269, 273, cert. denied, 409 U.S. 1128, 93 S.Ct. 948, 35 L.Ed.2d 260; United States v. Clayton, 1 Cir. 1971, 450 F.2d 16, 20, cert. denied, 405 U.S. 975, 92 S.Ct. 1200, 31 L.Ed.2d 250. But the Second Circuit has recently rejected that interpretation of *Dutton*. See United States v. Puco, 2 Cir. 1973, 476 F.2d 1099, rehearing en banc denied, *id.* at 1111, cert. denied, 414 U.S. 844, 94 S.Ct. 106, 38 L.Ed.2d 82. Although the other circuits, including our own, have continued to apply the federal co-conspirator exception, none has unequivocally decided whether evidence introduced under the exception may in certain circumstances violate the confrontation clause.[13]

13 The Tenth Circuit has stated, after *Dutton* but apparently without considering *Dutton*, that evidence introduced under the federal co-conspirator exception does not violate the confrontation clause. United States v. Cox, 10 Cir. 1971, 449 F.2d 679, cert. denied, 406 U.S. 934, 92 S.Ct. 1783, 32 L.Ed.2d 136. It is not clear that *Cox* should be considered post-*Dutton:* the Court cited this Court's opinion in Evans v. Dutton, 5 Cir., 400 F.2d 828, without noting that it had been reversed by the Supreme Court. The Ninth Circuit has conflicting decisions. Compare United States v. Adams, 9 Cir. 1971, 446 F.2d 681, cert. denied, 404 U.S. 943, 92 S.Ct. 294, 30 L.Ed.2d 257, and United States v. Nunez, 9 Cir. 1973, 483 F.2d 453, with United States v. Everidge, 9 Cir. 1973, 488 F.2d 1. We brushed the question in Hoover v. Beto, 5 Cir. 1972, 467 F.2d 516, cert. denied, 409 U.S. 1086, 93 S.Ct. 703, 34 L.Ed.2d 673, when a majority of this Court, en banc, held that the hearsay introduction of an oral confession pursuant to Texas' rule permitting the introduction of the confession of a principal at the trial of an accomplice for the purpose of prov-

We do not view this as the proper occasion to throw the weight of this circuit on one side or the other of the debate. Even if we were to endorse the First Circuit's analysis, it is not at all clear that the hearsay testimony introduced in this case would have been properly admitted under the federal co-conspirator exception. The federal exception applies to declarations of co-conspirators made during and in furtherance of the conspiracy when the conspiracy and the defendant's participation are proved by independent evidence. See Federal Rules of Evidence, Rule 801(d)(2)(E) (1972); 3 Wharton's Criminal Evidence § 642 (13 ed. 1973). The Supreme Court has pointed out that the federal exception applies only to declarations made in furtherance of the "main aim" of the conspiracy and, unlike the Georgia rule, does not extend to the concealment stage where the aim is "preventing detection and punishment". Krulewitch v. United States, 336 U.S. at 444. Even under the State's theory, the murder would appear to have been geared more toward protecting the participants in the liquor conspiracy from prosecution than toward furthering illegal liquor sales. Moreover, it is questionable whether Park's participation in the murder conspiracy would properly be considered established by independent evidence under the federal exception. The

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ing the guilt of the principal does not violate the Sixth Amendment. Although this Court stated baldly, "Neither the Sixth nor the Fourteenth Amendment is violated when hearsay evidence is admitted in accordance with recognized exceptions to the hearsay rule", *id.*, 467 F.2d at 533, the Court went on to say: "Where hearsay evidence is admitted, the record must affirmatively show those indicia of the statement's reliability and trustworthiness which in turn serve as adequate substitutes for the right of cross-examination." *Id.* After noting that the Texas exception was "well-recognized", the en banc Court examined the "indicia of reliability" present in the case.

only conspiracy in which Park's participation was independently proved was the illicit liquor conspiracy, and the ties between the liquor and the murder conspiracies were not tight; at best the conspiracies were related by an overlap of membership (Pinion and Seay) and motive.

In any event, whether the testimony would be admissible under the federal rule is not the proper inquiry. To place Seay's testimony against the wooden framework of the elements of the federal exception, and to have affirmance or reversal of Park's conviction depend on the fit, would remove the analysis twice over from the real issue, the "accuracy of the truth-determining process." Dutton v. Evans, 400 U.S. at 89. *Dutton* and *Green* clearly indicate that, at least where the state's co-conspirator exception is more expansive than the federal, the proper approach for federal courts on habeas corpus review of a state criminal conviction is to consider on a case-by-case basis whether the testimony meets the more general tests of reliability outlined in those opinions.

The Court endorsed a case-by-case approach in *Dutton*. In that case the respondent, Evans, was tried in a Georgia court for the murder of three police officers. Part of the evidence against him was the hearsay testimony of a cellmate of one of his co-defendants. The witness related that when Evans' co-defendant returned from his arraignment, he stated: "If it hadn't been for that dirty son-of-a-bitch Alex Evans, we wouldn't be in this now." The declaration, concededly made during the concealment phase of the criminal venture, was admitted as evidence, and its admission

was upheld by the Georgia Supreme Court under the Georgia co-conspirator exception to the hearsay rule. When the case worked its way up through federal habeas corpus proceedings, the Supreme Court upheld Evans' conviction.[14] The Court emphasized, however, that it was not thereby placing its imprimatur on all applications of the Georgia rule. Writing for the plurality, Justice Stewart observed: "The Georgia statute can obviously have many applications consistent with the Confrontation Clause, and we conclude that its application *in the circumstances of this case* did not violate the Constitution." 400 U.S. at 87-88 (emphasis supplied). See Favre v. Henderson, 464 F.2d at 363-364; Phillips v. Neil, 452 F.2d at 345.

The proper test by which to measure state hearsay exceptions under confrontation-clause attack has been variously stated. (1) Does the trier of fact have "a satisfactory basis for evaluating the truth of the prior statement"? California v. Green, 399 U.S. at 161, quoted in *Dutton*, 400 U.S. at 89. (2) How "real" is the possibility that cross examination "could conceivably have shown the jury that the statement, though made, might have been unreliable"? Dutton v. Evans, 400 U.S. at 89. (3) What "indicia of reliability" were present to permit the testimony to be placed before the jury although there was no confrontation of the declarant? *Id.* Each of these queries amounts to the same thing; each is an articulation of a search for trustworthiness and accuracy. Although the Supreme Court has not thereby provided precise standards by

14 Justice Stewart wrote the opinion for the plurality of four Justices. Justice Harlan wrote a separate concurring opinion.

which to test the constitutionality of the admission of testimony under state hearsay exceptions,[15] by bracketing the target if not by a direct hit, the Court has made its meaning clear enough to convince us that we must overturn Park's conviction in this case. "[S]trict compliance with the confrontation clause — presenting the statement whose truth is at issue under oath, in the presence of the trier of fact and the defendant, and subject to cross-examination — provides the required 'satisfactory basis' " for admission of hearsay. The Supreme Court, 1970 Term, 85 Harv.L.Rev. 40, 191 (1971).

Commentators have frequently noted the inherent unreliability of hearsay statements implicating an alleged co-conspirator in the conspiracy, for example:

> "The invocation of a name may be gratuitous, may be deliberately false in order to gain advantages for the declarant greater than those that would flow from naming a real participant or none at all, may be a cover for concealment purposes . . ., or may represent an effort to gain some personal revenge."

Davenport, The Confrontation Clause and the Co-Conspirator Exception in Criminal Prosecutions: A Functional Analysis, 85 Harv.L.Rev. 1378, 1396 (1972). See also Levie, Hearsay and Conspiracy, 52 Mich.L.Rev. 1159, 1165-66 (1954); Comment, The Hearsay Exception for Co-Conspirators' Declarations, 25 U.Chi.L.Rev. 530, 540, 541 (1958); Note, Preserving the

15 See United States v. Clayton, 450 F.2d at 20.

Right to Confrontation. 113 U.Pa.L.Rev. 741, 756 (1965). On the record in this case, Seay's statement implicating Park in the plot to kill Hoard is the kind of testimony that illustrates well the wisdom of these perceptions.

Pinion had substantial motive to fabricate the involvement of the "old man" in the conspiracy. By implying to Seay that Park was behind the conspiracy, Pinion could add the "old man's" prestige to the undertaking and perhaps bolster Seay's hope that the plot was well-conceived and that the chances of apprehension were slim. In addition, by implying that Park was the source of the capital, Pinion could avoid further pressure to add to the pot. (I.e., "You know that if it were up to me, I would give you more, but my hands are tied".)[16] To be sure, through cross-examination before the jury Park's attorney was able to test Seay's sincerity, memory, and perception. We accept the jury's obvious conclusion that Pinion actually made the statements Seay attributed to him. See Dutton v. Evans, 400 U.S. at 88. But Seay was not able to testify as to the truth of Pinion's crucial implication — that Park was the moving force behind the scheme. See Douglas v. Alabama, 1965, 380 U.S. 415, 420, 85 S.Ct. 1074, 13 L.Ed.2d 934. Indeed, Seay testified that he had no independent knowledge of Park's involvement. Permitting cross-examination of Seay as to what he heard Pinion say was not enough.

Pinion's possible insincerity in implying Park's involvement in the conspiracy was not effectively counterbalanced by indicia of reliability. In *Dutton* the Court found present two of the most valuable indicia: the declarant's statement was spontaneous and against his penal interest. Here there were no such safeguards as to Pinion's sincerity. Pinion could have carefully contrived his reference to Park, and the reference to the "old man" was not against Pinion's penal interest.[17] There was no reason to suspect that Pinion's live testimony, and his cross-examination, would not have helped significantly to assure that the jury had "a satisfactory basis for evaluating the truth" of Pinion's statements. California v. Green, 399 U.S. at 161. Cross-examination is "the essential right secured by the Confrontation Clause". Douglas v. Alabama, 380 U.S. at 420.

16 In fact, according to Seay, Pinion stated that he was adding $500 to the amount the "old man" was willing to pay.

The jury could similarly have profited from cross-examination of Worley concerning his statement that the "old man" would have "something done" to Seay or his family if he attempted to back out of the murder plot. First, Pinion may have been in league with Worley to fabricate Park's involvement, and, as with Pinion's conversation, there were no indicia of reliability reflecting on Worley's sincerity. Second, Worley's statement may have represented what Pinion told him or what he surmised from the fact that Pinion generally worked for Park. We find no hint in the record that Worley had personal knowledge that Park was involved. Compare Dutton v. Evans, 400 U.S. at 88. We believe that the source of Worley's opinion

17 Although Pinion's statements, taken as a whole, were against his penal interest, the references to Park were not. To provide a meaningful guarantee of reliability, of course, it is necessary that the critical portions of the declarant's statements be against his penal interest. See Davenport, 85 Harv.L.Rev. at 1394.

that Park was a member of the conspiracy to murder Hoard was essential to the jury's consideration of the statement. When Park was denied the opportunity to cross-examine Worley, he was denied his right of confrontation.

If the record reflected that Worley and Pinion were unavailable to testify at Park's trial, we would face a considerably different question. Necessity has long been one of the factors in confrontation-clause analysis. In Mattox v. United States, 1894, 156 U.S. 237, 15 S.Ct. 337, 39 L.Ed. 409, the petitioner had undergone a conviction, reversal, retrial, and reconviction. Two of the government's witnesses who testified at the first trial had died before the second. The reporter's notes of their original testimony were read to the jury at the second trial. In response to Mattox' Sixth Amendment challenge, the Court said: "[G]eneral rules . . . however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case." 156 U.S. at 243. Permitting Mattox to go "scot free" simply because the witnesses providing the strongest proof against him were dead "would be carrying his constitutional protection to an unwarrantable extent". *Id.* Where declarants are unavailable to testify, federal courts have continued to balance the requirements of criminal prosecutions against the confrontation rights of defendants. "[T]here may be some justification for holding that the opportunity for cross-examination of a witness at a preliminary hearing satisfies the demands of the confrontation clause where the witness is shown to be actually unavailable". Barber v. Page, 1968, 390 U.S. 719, 725-726, 88 S.Ct.

1318, 20 L.Ed.2d 255. See also Phillips v. Neil, 452 F.2d at 348; United States v. Weber, 3 Cir. 1971, 437 F.2d 327, 336, cert. denied, 402 U.S. 932, 91 S.Ct. 1524, 28 L.Ed.2d 867. We too appreciate that the confrontation clause question is more difficult where there is a strong likelihood that, unless introduced in evidence as a hearsay exception, extrajudicial statements will be lost entirely. United States v. Weber, 437 F.2d at 336.

There is no evidence before us, however, that either Worley or Pinion was in fact unavailable to testify. The State concedes in its brief that both Worley and Pinion were serving life sentences in Georgia prisons at the time of Park's second trial.[18] Compare Mancusi v. Stubbs, 1972, 408 U.S. 204, 92 S.Ct. 2308, 33 L.Ed.2d 293. And there was no significant likelihood that either Worley or Pinion would have successfully refused to testify on Fifth Amendment grounds. Compare Hoover v. Beto, 5 Cir. 1972, 467 F.2d 516, 540 (en banc), cert. denied, 409 U.S. 1086, 93 S.Ct. 703, 34 L.Ed.2d 673. One may fairly infer that the State did not call Pinion and Worley as witnesses simply because of an apprehension that they would exculpate Park on the stand, perhaps by denying that they ever made the statements attributed to them, perhaps by testifying that they had invoked Park's name without factual basis. In other words, it appears that the State preferred to rely on Seay's hearsay recitation of conversations with Pinion and Worley primarily due to a fear

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18 Seay and Blackwell were also incarcerated at the time of Park's second trial. Their incarceration proved to be no insurmountable burden in producing them to testify.

that calling the actual declarants to the stand would hurt its case.[19]

We recognize that *Dutton* did not require the prosecutor to make a showing of why the declarant was not called to testify. Although the plurality did not expound on the matter, the answer seems to lie with two factors: the testimony carried strong indicia of reliability[20] and was neither "crucial" to the prosecution's case nor "devastating" to accused.[21] We have already discussed the unreliability of the co-conspirator declarations in this case. It is also clear to us that they were "crucial" and "devastating". The statements by Pinion and Worley formed the only evidence that linked Park directly to the murder. Without either statement the prosecution would have had no case; with only one the prosecution's case would have lacked corroboration and would have been severely weakened. That the statements were "devastating" to Park is obvious.[22]

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19 See Phillips v. Neil, 452 F.2d at 347; Hoover v. Beto, 5 Cir. 1971, 439 F.2d 913, 924, rev'd on other grounds en banc, 1972, 467 F.2d 516, cert. denied, 409 U.S. 1086, 93 S.Ct. 703, 34 L.Ed.2d 673.

20 See also Mancusi v. Stubbs, 408 U.S. at 213.

21 The hearsay statement in *Dutton* was "of peripheral significance at most". 400 U.S. at 87. Evans was not just a co-conspirator; he fired the fatal shots. Twenty witnesses testified for the prosecution, including an eyewitness to the murders. The hearsay declaration was relatively harmless in that it was a conclusory statement by the declarant of his feelings toward the defendant. As is stated in the opinion: "The case does not involve evidence in any 'crucial' or 'devastating' sense as did all the cases just discussed." *Id.*

22 Justice Harlan, concurring in *Dutton*, retreated from the view he expressed in *Green* that the essence of the confrontation clause is "availability" and that the prosecutor must produce all available witnesses rather than relying on hearsay testimony. See 399 U.S. at 174. Upon reconsideration, Harlan felt that a rule requiring production of available witnesses would "significantly curtail the development of the law of evidence to eliminate the necessity for production of declarants where production would be unduly inconvenient and of small utility to a defendant". 400 U.S. at 95-96. Harlan's concern for streamlining the judicial process is not at stake in this case. There is no evidence that production of Pinion and Worley would have been "unduly inconvenient". Clearly, it would not have been of "small utility" to Park.

Considerations of elemental fairness[23] and of the "accuracy of the truth determining process" demand that we prevent the substitution of devastating, unreliable hearsay testimony for live testimony and an opportunity for cross-examination by the accused. The importance of cross-examination is in direct relation to the damaging quality of the hearsay. The prosecution may not hide a weak case behind a hearsay shield to obtain a conviction.[24] We hold that in the circumstances of this case, where the declarants were not shown to be unavailable and where their out-of-court statements were not supported by significant indicia of reliability and were "crucial" and "devastating", the accused was denied his Sixth Amendment right of confrontation when the declarants were not produced as witnesses by the State.

That the defendant Park could have called Pinion and Worley as witnesses does not affect our holding.

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23 See Davenport, 85 Harv.L.Rev. at 1403.

24 One commentator has suggested that an "availability rule" be a canon of professional behavior. He notes: "The objection to the prosecutor's presentation of hearsay instead of an available witness is not that such hearsay necessarily is less reliable than the hearsay of an unavailable witness, but that the prosecutor has made the testimony less reliable than it might have been." Note, Confrontation and the Hearsay Rule, 75 Yale L.J. 1434 (1966). See also Read, The New Confrontation — Hearsay Dilemma, 45 S.Cal.L.Rev. 1, 49 (1972).

The burden of producing witnesses to meet the accused's right of confrontation falls on the State. The alternative of the defendant's calling the declarants was not an adequate substitute: On cross-examination the defendant has greater freedom in questioning a witness, such as the right to use leading questions; and the State can impeach the witness with evidence of prior crimes; repetition of the hearsay, on cross-examination by the State, will increase its impact. See Note, The Supreme Court, 1970 Term, 85 Harv.L.Rev. 1, 195 (1971). We endorse the Seventh Circuit's view:

> "It seems to us . . . that where an extrajudicial declaration is used under circumstances such that the opportunity to cross-examine the declarant is essential to a defendant's right of confrontation, it must be the government's burden to produce the declarant. Mere availability, in the sense that the defendant could have subpoenaed him, does not, in our opinion, suffice."

Simmons v. United States, 7 Cir. 1971, 440 F.2d 890, 891. This Court has previously adopted a similar approach. In Hoover v. Beto, 5 Cir. 1971, 439 F.2d 913, rev'd on other grounds en banc, 1972, 467 F.2d 516, cert. denied, 409 U.S. 1086, 93 S.Ct. 703, 34 L.Ed.2d 673, the State introduced hearsay testimony of a principal's oral confession in the trial of an alleged accomplice. With regard to the State's argument that the defendant could have called the principal to the stand, the panel said:

> "The State did not call [the principal] Sellers as a witness, and it has failed to meet the requirements for applying California v. Green, supra. The inference to be drawn is that the State was apprehensive that Sellers could recant his confession or refuse to testify. The State evidently did not want to be in the position of introducing the confession by way of impeaching or rebutting Sellers' testimony. It preferred to introduce the confession in its case in chief and put the burden of rebuttal on the defense.
>
> That Sellers was available to be called as a witness does not mitigate the prosecution's misconduct here. The State sought to shift to the defendant the risk of calling Sellers to the stand. To accept the State's argument that the availability of Sellers is the equivalent of putting him on the stand and subjecting him to cross-examination would severely alter the presumptions of innocence and the burdens of proof which protect the accused. Hoover's undoubted right to call Sellers as a witness in his behalf cannot be substituted for his Sixth Amendment right to confront Sellers as a witness against him."

439 F.2d at 924.

Although the *Dutton* plurality opinion and Justice Harlan's concurring opinion include passing references in footnotes to the fact that the accused could

have called the declarant to testify,[25] neither the plurality nor Justice Harlan relied on this fact in holding that the accused's constitutional rights were not violated. More important, there was no evidence that by calling the declarant the accused would have sacrificed other significant trial weapons. In the case before us, if Park had called Pinion and Worley, the defendant apparently would have lost his right under Georgia law to make opening and closing argument before the jury.[26] In these circumstances we deem it particularly unwise to tinker with the rule that the prosecutor may not shift the burden of producing available witnesses to the accused.

Park's conviction must be vacated. Unless the State commences prosecution of the case within a reasonable time, the writ shall issue.

Reversed and remanded.

COLEMAN, Circuit Judge (dissenting):

I respectfully dissent.

Park has twice run the gauntlet of Georgia trials and appeals involving a particularly heinous form of murder.

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25 400 U.S. at 88 n. 19, 96 n. 3.

26 The Georgia Supreme Court considers the improper deprivation of a defendant's right to make opening and closing argument before the jury to require reversal of a conviction. See Park v. State, 162 S.E.2d at 368; note 3 *supra*.

The sole issue for us, as a federal habeas corpus court, is whether Park has been denied the right of confrontation guaranteed by the United States Constitution. The majority opinion analyzes the factual issues and the inferences reasonably to be drawn therefrom [ordinarily the function of the trial jury] and concludes that Park was unconstitutionally deprived of confrontation.

In many respects, I disagree with the factual analysis and I respectfully disagree with the legal conclusion.

I think the evidence very clearly establishes a motive for Park wishing to get rid of the prosecutor, who paid with his life for his desire to enforce the law against a locally powerful liquor ring. In my view, the motive matches the reprehensible event. We should not consider Park's activities as being somehow insulated or immutably partitioned off from each other. They were all part of a common fabric and they ought not to be thus dissipated unless we are to rewrite the law of conspiracy so as to exclude statements of co-conspirators, made outside the presence and hearing of others jointly indicted and jointly prosecuted. I specifically point out that the statements attributed to Park were made before the murder, not afterwards, as in *Dutton*.

Accordingly, I do not agree with what is being done in this case.

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

A. C. PARK

versus C.A. No. 1477

H. T. (TOMMY) HUFF

CHRONOLOGY

Petitioner, A. C. Park, was indicted for the dynamite murder of Solicitor General Floyd Hoard on December 4, 1967, by the Grand Jury of Jackson County, Georgia. Co-defendants Douglas Pinion, J. H. Blackwell, Loyd George Seay, and George Ira Worley were also indicted for the same offense.

The first trial of petitioner, in January, 1968, severed from that of the co-defendants, resulted in a verdict of guilty with the imposition of the death penalty. On appeal, the Supreme Court of Georgia reversed the conviction. *Park v. State*, 224 Ga. 467 (1968). A petition for a writ of certiorari was denied by the United States Supreme Court. *Park v. Georgia*, 393 U.S. 980 (1968). The case was then tried before a second jury. A second verdict of guilty was returned and the petitioner was again sentenced to death. The second conviction was appealed to the Supreme Court of Georgia. That Court affirmed the conviction. *Park v. State*, 225 Ga. 618 (1969). Included in the appeal to the Supreme Court of

Georgia were seven enumerations of error dealing with alleged violations of the petitioner's right of a confrontation. A rehearing was sought before the Supreme Court of Georgia and was denied. Certiorari was granted by the United States Supreme Court and the case was remanded for reduction of the death penalty, but without any ruling on the merits. *Park v. Georgia*, 408 U.S. 935 (1972). Petition was then filed in this court for a writ of habeas corpus. As to these claims, there is sufficient exhaustion of state remedies. 28 U.S.C. § 2254.

FACTS

Floyd Hoard was the Solicitor General of the Piedmont Judicial Circuit and resided in Jackson County, Georgia. The petitioner resided in that same judicial circuit. During the early morning hours between 7:00 and 7:30 A.M. on August 7, 1967, Hoard was killed when dynamite wired to the ignition system of his car exploded.

The record shows that immediately prior to the death of Hoard, the petitioner had been engaged in a large scale illegal traffic in beer, wine, and whiskey. Early in the summer of 1967 Hoard had initiated plans to move against petitioner's illegal liquor operations. Thereafter petitioner's operations were raided and contraband was seized. Estimates of the sales arising from the illegal operation ranged from $300 to $1,400 per week. Involved in the illegal liquor business with petitioner were co-defendants Pinion and Seay. Pinion acted as petitioner's "enforcer" and employed the use of guns and the administration of beatings in the prosecution of petitioner's "business."

After an investigation of approximately four months the Jackson County Grand Jury indicted the petitioner together with Pinion, Blackwell, Seay, and Worley for the murder of Hoard. At the time of the petitioner's second trial in April 1969, all four co-defendants were serving life sentences for the murder. Seay and Blackwell pleaded guilty upon recommendations by the State for life sentences. Pinion and Worley were tried and found guilty by juries.

On the second trial of petitioner it was shown by the State that the co-defendants Seay, Blackwell, and Worley together purchased the dynamite and wired it to Hoard's car and that Pinion hired and paid Seay to do the killing. Neither Worley nor Pinion testified at petitioner's second trial. Seay had testified for the State during the first trial of the case. Upon the second trial, Seay was again called as a State's witness. Seay answered several questions as to his name and place of confinement and then invoked his fifth amendment privilege against self-incrimination. Petitioner's counsel, who had appeared at the first trial on behalf of petitioner and who had thoroughly cross-examined Seay then, objected to the State's introduction of the transcript of Seay's former testimony on the ground that petitioner's right to confrontation would be abridged. The trial court overruled the objection and the State read Seay's testimony from the first trial to the jury. The transcript revealed that Seay therein testified to the following: (1) that he (Seay) had been told by Pinion that the "old man", later identified by Seay as being the petitioner, would not pay any more money to have Hoard killed; (2) that after the murder Pinion had told him that the "old man" was worried and

wanted to know who had committed the murder; and, (3) that he was told by Worley that if he didn't go through with the killing the "old man" would have something done to him and his family. The State proved independently and through the testimony of law enforcement officers that petitioner was generally known in the community as the "old man."

Later in the second trial Seay was recalled to the stand. Seay then proceeded to testify on direct examination. Seay's live testimony to the jury was substantially similar to the transcript of his prior testimony which had been read to the jury after his initial refusal to testify. Following Seay's live testimony to the jury, petitioner's counsel (the same counsel who had cross-examined Seay at the first trial) engaged in an extensive cross-examination of Seay which fills some thirty-six pages of the trial transcript. The transcript of Seay's testimony also included a recitation of events which infers that coercion and duress were brought to bear on Seay in order to force him to confess his guilt. A statement of confession, inculpating the petitioner, was in fact related to Ronnie Angel, an agent of the Georgia Bureau of Investigation (hereinafter GBI), at the Georgia State Patrol Barracks in Gainesville, Georgia on December 3, 1967. The State made no attempt at the trial to refute any of the testimony indicating that threats or coercion had been used to obtain Seay's confession.[1]

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1 At the trial when Seay's and Blackwell's allegedly tainted confessions were introduced through the testimony of Angel and Artilda Gayton (Blackwell's girl friend) petitioner's objections asserted only that the introduction of such testimony violated his confrontation right. No objection was articulated vis-a-vis a possible due process deprivation.

The State called Blackwell to the stand at the second trial of petitioner. Blackwell refused to be examined on any matter, stating, "I stand on the fifth amendment and refuse to answer any questions on the ground that it might tend to incriminate me." (T-299) Thereafter, over petitioner's objection based upon a deprivation of confrontation right, the testimony of Blackwell from the first trial, including his cross-examination, was also read to the jury. The transcript of Blackwell's testimony revealed: (1) that he, together with Seay and Worley, went to South Carolina to purchase dynamite; (2) that the three of them went to Hoard's residence where Blackwell wired the dynamite and caps to the ignition of Hoard's car; and, (3) that Seay paid Blackwell $1,500 for his participation in the murder. The transcript of Blackwell's testimony further showed that on November 27, 1967 while confined in the Fulton County Jail he gave a confession to Sheriff Roland Attaway, two members of the GBI (including Ronnie Angel), and the prosecuting attorneys. The transcript of Blackwell's testimony also included a recitation of events which infers that coercion and duress were brought to bear on Blackwell in order to force him to confess his guilt. As with the confession of Seay, the State made no attempt at the trial to refute any of Blackwell's testimony indicating that coercion had been used in obtaining his confession.

Following the introduction of Blackwell's testimony the State called Blackwell's girl friend, Artilda Gayton, as a witness. She testified that when she visited Blackwell at the Fulton County Jail on November 27, 1967 and asked him how much he knew about the Hoard murder, Blackwell replied that he

knew enough to send him to prison for a long time. (T-304).

Thereafter the State called Ronnie Angel, an agent of the GBI. Angel, over petitioner's objection based on confrontation rights, testified to the contents of the confessions of both Seay and Blackwell.

THE ISSUES RAISED

The writ raises difficult evidentiary questions in the trial of conspiracy cases. Petitioner here explicitly makes three claims as to alleged violations of his "right to confrontation" under the sixth amendment occurring during his second trial, to wit:

(1) Loyd Seay, a State witness, was permitted to testify to the contents of statements made to him by two other co-conspirators, Doug Pinion and George Worley; said statements of Pinion and Worley allegedly inculpated the petitioner;

(2) the transcript of testimony taken at petitioner's first trial of co-conspirators Seay and Blackwell was read to the jury during petitioner's second trial; both co-conspirators were physically present at the second trial but refused to testify when initially called; and

(3) the State introduced into evidence the ex parte confessions given by co-defendants Seay and Blackwell to a police officer outside the presence of petitioner; testimony on the

record indicates that the confessions were possibly coerced.

The court in examining petitioner's brief in support of his application for a writ of habeas corpus discerned another less explicit argument concerning the constitutionality, from a due process standpoint, of the admission into the trial of the possibly coerced confessions of Blackwell and Seay. Concerned with the comity problem of whether this due process argument was presented to and exhausted in the Georgia courts, the court asked petitioner for clarification. 28 U.S.C. §2254. Petitioner's response in pertinent part follows, to wit:

"Petitioner responds to the order of this Court dated February 14, 1973, with respect to the question that introduction of the alleged coerced confessions into petitioner's second trial violated petitioner's due process rights: i.e. that introduction into a trial of a coerced confession is per se a denial of due process.

Petitioner did not make this contention or argument in the State Court. We do not at this time make such a contention or offer such argument. . . .

. . . [W]e wish to reiterate that the question offered in the trial court and later in the Georgia Supreme Court dealt with the right of the defendant to be confronted by the confessors as to the truthfulness of the facts sought to be proved by the State by the means of their ex

parte confessions." Response of Petitioner to Court Order Dated February 14, 1973, pp. 1-2.

Each of the confrontation claims will be considered separately hereinbelow.

THE DECLARATIONS OF CO-CONSPIRATORS

Under Georgia law, proof of conspiracy is required for admission of the testimony of Seay as to the declarations made to him by Pinion and as to statements made to him by Worley. Ga. Code Ann. § 38-306. That Code section provides in pertinent part:

"After the fact of a conspiracy shall be proved, the declarations by any one of the conspirators during the pendency of the criminal project shall be admissible against all."

Moreover, the conspiracy itself must be proved by evidence aliunde such declarations, and the declarations are not admissible unless the conspiracy is prima facie shown by such aliunde evidence. *Lanier v. State*, 187 Ga. 534 (1939).

The State showed: (1) that on the day of Hoard's death Hoard had planned to present facts as to Park's illegal activities to the grand jury, (2) that Hoard had instituted padlock proceedings against Park; (3) that Hoard had caused the confiscation of Park's contraband alcohol; (4) that Hoard had filed criminal accusations against Park and others; (5) that Park's liquor locations had been padlocked; (6) that Park's liquor organization had paid $6,300 in fines; and (7) that

the contraband liquor had not been destroyed. The Supreme Court of Georgia found that on this record "a conspiracy involving the defendant in the murder of Hoard was prima facie shown by such aliunde evidence, and the inferences and deductions therefrom."

The Supreme Court of Georgia, therefore, found that the testimony of Seay, which included statements by Pinion and Worley inculpating petitioner, was admissible hearsay satisfying the rules enunciated in Ga. Code Ann. § 38-306. *Park v. State*, 224 Ga. 467, 475 (1968). The Supreme Court of the United States in *Dutton v. Evans*, 400 U.S. 74 (1970), wherein the pertinent facts were analogous to those in the instant case, held that the co-conspirator hearsay exception applied by Georgia (Ga. Code Ann. § 38-306) is not invalid under the Confrontation Clause of the Sixth Amendment. Therefore, absent a showing that the declarants' statements were inherently unreliable the testimony is clearly admissible under *Dutton v. Evans, supra*. *See* Davenport, The Confrontation Clause and the Co-Conspirator Exception in Criminal Prosecutions, 85 Harv.L.Rev. 1378 (1972). While this court might question the propriety of Georgia's co-conspirator hearsay rule, it is necessarily bound by the Supreme Court's ruling in *Dutton v. Evans, supra*, and the writ is denied or this ground.

THE TRANSCRIPTS OF FORMER TESTIMONY

At the second trial of the petitioner it was shown by the State that co-defendants Seay, Blackwell and Worley together purchased the dynamite and wired it

to the car and that Pinion hired and paid Seay to do the killing. Neither Worley nor Pinion testified. Blackwell was sworn by the State, gave his name and current place of confinement, and refused to answer further on the ground of self-incrimination. (T-391-510). Blackwell was excused from the stand. The State then read to the jury, over objection by counsel for petitioner, the transcript of the former testimony of Blackwell on the previous trial. (T-391-510). Thereafter, the State offered Seay as a witness. Seay answered several questions as to his name and place of confinement, and then invoked the self-incrimination privilege. (T-512-519). The State then read to the jury, over petitioner's objection, the transcript of Seay's testimony as given on the former trial. During the first trial of petitioner, petitioner's counsel (also the same attorney at the second trial) thoroughly cross-examined both Blackwell and Seay. Petitioner contends that the statements by Blackwell and Seay, introduced through the former testimony, inculpated him and denied him his right of confrontation guaranteed by the Sixth Amendment. The State contends that the statements of Blackwell did not inculpate the petitioner and admits that the statements of Seay did inculpate petitioner. The State notes however that since Seay later took the stand in the second trial and testified to essentially the same facts brought out through the reading of the transcript the right of confrontation was not denied. Moreover, the State asserts that the right to confrontation was not denied petitioner since petitioner thoroughly cross-examined both Seay and Blackwell at the first trial.

A reading of *United States v. Mobley*, 421 F.2d 345 (5th Cir. 1970) and *United States v. Wilcox*, 450 F.2d

1131 (5th Cir. 1971), *cert. denied*, 405 U.S. 917 (1972) compels the conclusion that, under these circumstances, introduction of the transcript of Blackwell and Seay's former testimony in petitioner's second trial did not work to deny petitioner his right of confrontation in the matter sub judice. In *Mobley*, *supra* at 349-350 the court stated:

> "We find no violation here of the principles expressed in Mattox v. United States [citations omitted] and Barber v. Page [citations omitted], relative to the rights of an accused to confrontation and the opportunity to have a jury assess the demeanor and credibility of a witness. Both of these requirements were satisfied by the former trial, when the witness was under oath and thoroughly examined on both direct and cross-examination .... In *Mattox* the Supreme Court affirmed the action of the trial court in allowing, at the second trial, a reading of a transcript of testimony of two witnesses who had been examined and cross-examined on a former trial and were no longer available. . . ."

In *Mobley* just as in the instant case the witness refused to answer questions at the second trial. The panel ruled that the witness was "unavailable" under those circumstances just as surely as he would have been due to death, absence from the country, or a physical inability to speak. *United States v. Mobley*, 421 F.2d 345, 350-51 (5th Cir. 1970). *See also* Rule 804, Proposed Rules of Evidence for the United States Courts and Magistrates. Accordingly, the writ is denied on those grounds.

THE CO-CONSPIRATORS' CONFESSIONS: THE CONFRONTATION QUESTION

Petitioner asserts that the introduction of the confessions of Blackwell and Seay through the testimony of the State's witness Ronnie Angel violated petitioner's right to confrontation. Petitioner also complains that the Blackwell confession introduced into testimony by Artilda Gayton deprived petitioner of his confrontation rights.

The State counters with the fact that Blackwell's alleged confessions in no way inculpated or even mentioned the petitioner and thus could not have violated petitioner's Sixth Amendment right. Such an argument is consonant with the ruling in *White v. United States*, 415 F.2d 292 (5th Cir. 1969), *cert. denied*, 397 U.S. 993 (1970). In *White* the panel held that the defendant was not denied his Sixth Amendment right of confrontation by the introduction of an extra-judicial confession of his co-defendant, when the confession did not inculpate or implicate the defendant. *White v. United States*, 415 F.2d 292, 294 (5th Cir. 1969). Petitioner argues, however, that Blackwell's confession served to corroborate the confession and testimony of Seay, as required by Georgia law. *See* Ga. Code Ann. § 38-121; *Coleman v. State*, 227 Ga. 769 (1971); *Caldwell v. State*, 227 Ga. 703 (1971); *Lindsey v. State*, 227 Ga. 48 (1970).[2] A reading of those portions of the transcript

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2 In the federal law it is sufficient if the independent evidence together with the confession, establishes guilt beyond a reasonable doubt. *Opper v. United States*, 348 U.S. 84 (1954); *Smith v. United States*, 348 U.S. 147 (1954); *Moll v. United States*, 413 F.2d 1233 (5th Cir. 1969). Moreover, the corroborating independent facts need only support the essential facts admitted sufficiently to justify a jury inference of their truth. *Opper v. United States*, *supra*; *United States v. Frazier*, 434 F.2d 994 (5th Cir. 1970).

submitted to the court together with the opinions of the State courts compels the conclusion that there was ample other evidence to corroborate the statements of Seay apart from the confession of Blackwell. Indeed this is the thrust of the Georgia Supreme Court holding. Thus, even if a *Bruton* error had occurred in the admission of Blackwell's confession the court would be constrained to conclude that any such confrontation violation was harmless beyond a reasonable doubt. See *Schneble v. Florida*, 405 U.S. 427 (1972); *Harrington v. California*, 395 U.S. 250 (1969); *Posey v. United States*, 416 F.2d 545 (5th Cir. 1969), *cert. denied*, 397 U.S. 946 (1970).

As indicated above, Seay, after initially refusing to answer questioning at the second trial, later elected to take the stand and was thoroughly examined and cross-examined. Seay's examination and cross-examination came after introduction of both his former testimony by transcript and his extrajudicial confession tendered by Angel. Petitioner had ample opportunity to cross-examine Seay as to the inculpatory confession and was therefore not denied his Sixth Amendment confrontation right. *Byrd v. Comstock*, 430 F.2d 937 (9th Cir. 1970), *cert. denied*, 401 U.S. 945 (1971).

For the reasons stated, the application for habeas corpus is, therefore, denied.

IT IS SO ORDERED.

This the 26th day of February, 1973.

/s/ SIDNEY O. SMITH, JR.
Sidney O. Smith, Jr.
United States District
Judge